IN THE

Supreme Court of the United States

OCTOBER TERM, 1902.

THOMAS C. BEDFORD AND EMMA BEDFORD, *Appellants*,
vs.
THE UNITED STATES, *Appellee*.
No. 277.

APPELLANTS' ASSIGNMENT OF ERRORS, STATEMENT OF CASE AND BRIEF.

ASSIGNMENT OF ERRORS.

Appellants assign as error of the court of claims:

1. The finding of fact that because the "revetment did not change the course of the river as it then existed," * * therefore * * "the injury done to the claimants' land was an effect of natural causes." The fact is, "*The injury caused by the government was by interrupting the further progress of natural causes*," as the court has also found.

2. The court of claims erred in its conclusion of law,

That, because the government has control of navigable streams, and has "the undoubted power and authority to improve the river by the construction of the revetment," that, like riparian rights, "damage resulting from the construction of the dike (revetment) for the public good, was" * * * "merely incidental to the exercise of a servitude to which * * property had always been subject," and in its entire opinion.

The law is, as pronounced by this court, January 26, 1903, in United States against Lynah *et al.*, No. 45, that "Although in the discharge of its duties the government may appropriate property, it can not do so without being liable to the obligation cast by the fifth amendment of paying just compensation." That "Where the government, by the construction of a dam or other public works, so floods lands belonging to an individual as to substantially destroy their value, there is a *taking* within the scope of the fifth amendment."

That notwithstanding the fact that the government has full control over navigation and the improvement of navigable rivers, if in exercising such control and in doing the work of such improvement the property of an individual is appropriated (as it is in the case at bar), compensation must be made. The fifth amendment applies to an appropriation of property where it is taken on account of navigation the same as any other "taking."

Statement of Case.

By the construction of the revetment at Delta Point on the Mississippi river the current of the river was *directed* and *held* against appellants' land until it washed away and appropriated 2,300 acres thereof.

Had the river been permitted to continue its natural and undoubted course after the cut-off of 1876, Delta Point would have washed and eroded away; so that by the time the alluvial deposit inside the hills on the Mississippi (state) side had been cleared out to the rocks on that side the current would have missed by a new angle of deflection appellants' land altogether and none of it would have been appropriated, and their plantation would now remain undisturbed.

In 1876, when the Mississippi river severed De Soto Point from the main land by cutting across the narrow neck of land below Vicksburg, it ran directly across to the Mississippi state side with great force and fiercely attacked the alluvial deposit lying at the base of the rock-bound hills on that side and began a rapid disintegration thereof, thence deflected to the Louisiana state side. The current, in its new course, as savagely attacked the point of land at the cut-off on its right known as Delta Point, and rapidly wore it away. With the progress it was making it was destined to soon reach the lands lower down stream through which Grant's canal was cut. Had the river gone on in its erosion of Delta Point, as it was bound to do of its own natural force, the river would have struck the Mississippi side still lower and lower as the erosion of Delta Point progressed, and its deflection to the Louisiana side where appellants' lands lay would also have been enough lower down so to have missed said lands altogether. The river should have been allowed to pursue its natural course.

Appellants were entitled to the natural and peculiar course and action of the river. The river, however, was not allowed to proceed upon its natural course. The government, to save the harbor of Vicksburg, and to keep the city of Vicksburg on the

river, arrested the river and controlled its course by building a revetment at Delta Point, on the Louisiana side, and directed and held the current of the river, by the aid of said revetment, from washing away Delta Point, and held it against the bank on the Mississippi side so as to deflect it, and did deflect it against appellants' land on the Louisiana side, pushing the said current eventually through said land, making a navigable water-way thereof. It is this *interruption of the natural course of the Mississippi river, by the government, which resulted in the appropriation of appellants' land* of which they complain.

The substantial facts of the case are as follows: In 1878 to 1880 the United States, in the execution of its rights and powers in and over said river, and in pursuance of its lawful control over the navigation of said river, and for the betterment and improvement thereof, by its duly authorized officers and agents, in pursuance of the following acts of Congress, 20 S. L. 363, 366; 21 S. L. 181 and 470; 26 S. L. 450 and 1116; made and caused to be made and put in a certain revetment of willow, stone and other material, at a point immediately up said river a distance of about six miles from the north line of said described land at a place called Delta Point, Louisiana, where a cut-off of the river had occurred in the spring of 1876.

That said revetment was constructed along said river for a distance of one-half mile; that said revetment was so constructed, at said point in and on said river, as to effectually and completely divert the waters of said river from its natural southward course toward the east; and said revetment was constructed also for the purpose of keeping the bed of said river channel from moving southwestward at the point of said construction in the state of Louisiana, and for

the further purpose of preserving the harbor for the city of Vicksburg, in the state of Mississippi.

That said revetment was constructed in the years 1878, 1879 and 1880 as aforesaid, and was rebuilt and improved and extended by defendant in the years 1892 and 1893. That the construction and maintenance of said revetment prevented the erosion of Delta Point, Louisiana, and caused the waters of said river to be diverted from a south and southeasterly course to an easterly course, and to be thrown with great force against the east bank of said river, which bank extends from the north to the south, is high and strong and is composed of limestone and other hard substances, which do not give way to erosion. That said waters were and are diverted as aforesaid, by said revetment against said east bank with great force, and was and is by said bank thrown back against the west bank of said river also with great force, at and along the bank of said west side, where said described sections of land are located, and directed against the same.

That owing to said revetment constructed by the government as aforesaid, the channel and current of the Mississippi river were directed against and upon the said lands of the petitioners, wherein and whereby 2,300 acres of the same were washed away and appropriated by the waters of the Mississippi river, and the United States has therein and thereby appropriated plaintiffs' lands to their own public use.

Brief of Argument.

We hold that there can be no difference in principle between the taking of land by the government for a navigable waterway for the use of steamboat traffic

for the public good and that of backing up water over a man's land through a public dam constructed so as to work such a result, as this court held in the said case of *United States* v. *Lynah et al.*, the present term, above referred to. The revetment as well as the dam appropriates the land and deprives the owner of its use.

It was a public statute which authorized the dam, and it was a public statute which authorized the building of the revetment. The officers of the law derived their authority, in both instances, from the same source.

Both enterprises were for the public good, and the public good, in both instances, was at the expense of private rights. The one was to afford the public wholesome drinking-water, the other water at a particular place on which to navigate.

Both were eminent domain, even though navigation was sought to be improved in one. The one had no other excuse for its appropriation of private property, the other claimed rights beyond public ownership, namely, the right to *improve* its public ownership.

Where this public right is asserted are private rights not to be respected? Appellants are told that constitutional guarantees of private property only extend to cases where eminent domain is exercised independently; that the right to improve the navigation of a river may involve the appropriation of private property, yet the individual has no recourse; that the constitution does not mean him when it says, "nor shall private property be taken for public use without just compensation."

The court of claims put appellants' lands, from which they drew their substance, upon a par with the riparian rights of their lands. As we understand the

court of claims, because riparian rights are subject to navigation rights and under servitude thereto, the fee-simple of lands lying on a navigable stream, is also subject to public water-way rights, and may be appropriated to public use without "just compensation."

We must respectfully take issue with this conclusion. We maintain that a man's land is not subject to the uncompensated appropriation of a navigable river. We also maintain that a man's land is not subject to the natural right of the improvement of navigation except on the basis of compensation.

Riparian rights are river rights; fee-simple lands are independent of the river and are in no wise related to river navigation. It may be admitted that a man's riparian rights are subject to the river, and the changes and improvements of the river, to which there may be mere consequential injury in making an improvement of navigation. Riparian rights are wholly dependent on the river. Fee-simple lands are not. But for the river or the navigable waters there would be no riparian privileges; not so with lands outside river bounds. Riparian rights are on a different footing from fee-simple ownership. By riparian rights is meant all rights in the alluvial accretions and the use thereof subject to navigable rights of the river itself. Land independent of the river limits is subject to no exception. The one is subject to the servitude of navigation; the other is not. Therefore it does not follow that because riparian rights must give way to navigable rights so must fee-simple lands. And it does not follow that because riparian rights are burdened with servitude to navigation that the lands to which riparian rights attach may be taken for a public use without just compensation. And it does not

follow that as because lands lie along a navigable stream that they, *by reason of their location*, are burdened with the servitudes of navigation, and that when same are taken in the course of public improvements of navigation they may not be paid for under authority of the fifth amendment.

The mere subordination of a riparian right to an improvement of navigation is not like a *taking* of independent lands for a public water-way. The one is the exercise of a proper servitude; the other is not. Independent lands are not subject to such a servitude. There is no such thing as servitude upon land ownership in the United States. Independent lands are of a dignity above mere riparian rights to accreted lands and lands above low-water mark.

In our view of this case, therefore, the case of Gibson, in 166 U. S., cited in the court of claims opinion, is not pertinent, and so with Gilman's case, 3 Wallace, also cited therein. It is not our contention that the government has not absolute control of navigable waters; and we do not contest the proposition that the shore and submerged soil is subject to servitude to navigation, but that appellant's property, if taken, must be paid for.

We insist that appellants' 2,300 acres of land—not being "shore and submerged soil"—was not subject to a so-called servitude to navigation. We contend that appellants' 2,300 acres of land, not being subject to servitude to navigation, was appropriated outright by the government to a public use, and that the constitution guarantees payment therefor precisely as was decided in the Great Falls case, in 112 U. S. 645.

There was a more real taking of appellants' land when the river-bed is made to occupy the place where

the 2,300 acres once were, than in the Great Falls case, where the lands are simply covered with water. Appellants' land was actually taken away to make room for the river; and the river now runs where their productive soil once was. If the Great Falls case was meritorious, why is there not merit here? And so in *Pumpelly* v. *Green Bay Co.*, 13 Wallace, 181.

In Gibson's case, in the construction of the dyke the plaintiff was deprived of the "use of her landing" through the greater portion of the gardening season, whereby the value of her farm was reduced $150 to $200 per acre. Here was only a consequential injury, not a *taking* of the property. Her landing was rendered inconvenient.

Such was the fact in Mills' Case, 46 Fed. Rep. 738. That suit was for compensation for *injuries* to a rice plantation, resulting from improvements of navigation. The declaration averred the damage to be $10,000, for which judgment was asked.

There was no averment that the plantation was appropriated to a public use.

The case at bar is different. Here the "improvement" caused the actual and physical appropriation of appellants' lands.

The language used by His Honor, Justice Brewer, in the Lynah case is exactly suitable to the facts in the case at bar. Here, "the government did not deny the title of the plaintiffs, * * nor did it pretend that it owned the property or had a paramount proprietary right to its possession. It did not put in issue the question of title. * * Nowhere in the record did it set up any title to the property antagonistic to that claimed by the plaintiffs. It simply denied responsibility for what it had caused to be done. * * * The case was tried on the theory that the government could

not be held responsible for what it had done." This case is exactly like said case and was tried on the same theory.

The right of the government to improve the harbor of Vicksburg and the navigation of the Mississippi river is conceded, as is also the right to take appellants' property in the accomplishment of these purposes; but this is a *governmental* right, not a *proprietary* right. All private property is held subject to the necessities of the government.

If, therefore, the officers and agents of the United States took appellants' lands under sanction of authority, the government is bound to make just compensation.

The building and maintaining the revetment was duly authorized by congress, as follows: (20 S. L., 363–366.)

Be it enacted, etc.,

"That the following sums of money be, and are hereby appropriated, to be paid out of any money in the treasury not otherwise appropriated, to be expended under the direction of the secretary of war, for the construction, completion, repair and preservation of the public works hereinafter named: For improving the Mississippi river at and near Vicksburg, and protection of harbor at Vicksburg, Mississippi, fifty thousand dollars."

In 21 Statutes at Large, 181:

"Improving Mississippi river at and near Vicksburg, and protection of harbor at Vicksburg, Mississippi; continuing improvement, twenty thousand dollars."

At page 470, same Statutes at Large:

"Improving Mississippi river at and near Vicksburg, and protection of harbor of Vicksburg, Mississippi, seventy-five thousand dollars."

Volume 26 Statutes at Large, page 450:

"Improving Mississippi river from the Head of the Passes to the mouth of the Ohio river * * * three million two hundred thousand dollars, which sum shall be expended under the direction of the secretary of war in accordance with plans * * * for the general improvement of the river * * * for the work at the harbors * * * of Vicksburg, Mississippi," etc.

By an act of congress passed March 3, 1891 (26 S. L., 1116), $1,000,000 was appropriated for the improvement of the Mississippi river from the Head of the Passes to the mouth of the Ohio, to be expended under the direction of the secretary of war in accordance with the plans of the Mississippi river commission.

The orders and directions of the secretary of war for the construction of said revetment were duly authorized therefore, and the taking of the claimants' land by the Mississippi river, which was diverted from its natural course against and upon said land by the said revetment, was a taking of their private property for public use as contemplated by the fifth amendment to the constitution.

The right of eminent domain underlies all property rights. The government may take real or personal property whenever its necessities require it.

As the court say in the Lynah case:

"Although there may have been no specific act of congress directing the appropriation of this property * * * yet if that which the officers of the government did, acting under its direction, resulted in an appropriation it is to be treated as the act of the government," and is a taking of the property.

As in the Lynah case, congress here "made appro-

priations from year to year for the improvement of the river, and these improvements were carried on under the direction of the officers and agents of the government. In the course of their duties, in pursuance of said appropriations, this revetment at Delta Point was built, and the appropriation of appellants' land resulted from its construction."

Does not an implied contract consequently arise to pay for such appropriation of property?

The Great Falls case is applicable here.

The court say:

"It seems clear that these property rights have been held and used by the agents of the United States, under the sanction of legislative enactments by congress, for the appropriation of money specifically for the construction of the dam from Maryland shore to Conn's Island was, all the circumstances considered, equivalent to an express direction by the legislative and executive branches of the government to its officers to take this particular property for the public objects contemplated by the scheme for supplying the capital of the nation with wholesome water. The making of the improvements necessarily involves the taking of the property; and if, for the want of formal proceedings for its condemnation to public use, the claimant was entitled, at the beginning of the work, to have the agents of the government enjoined from prosecuting it until provision was made for securing, in some way, payment of compensation required by the constitution, * * * there is no sound reason why the claimant may not waive that right, and, electing to regard the action of the government as a taking under its sovereign right of eminent domain, demand just compensation. (*Kohl* v. *United States*, 91 U. S. 367.)

"In that view we are of opinion that the United States, having by its agents, proceeding under the authority of an act of congress, taken the property of

the claimant for public use, are under an obligation, imposed by the constitution, to make compensation. The law will imply a promise to make the required compensation, where property, to which the government asserts no title, is taken, pursuant to an act of congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the government, as well as with common justice, the claimants' cause is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the court of claims of actions founded upon any contract, express or implied, with the government of the United States."

See, also,

Sanford v. *United States*, 101 U. S. 341;
Boone Co. v. *Peterson*, 98 U. S. 403;
United States v. *Jones*, 109 U. S. 573;
Barron v. *Baltimore*, 7 Pet. 243;
Withers v. *Buckley*, 20 How. 84.

In the case of Pumpelly against the Green Bay Company, 13 Wallace, page 166, there was an appropriation of private property for a public use, much like the case at bar.

The Green Bay and Mississippi Canal Company was a public corporation in the state of Wisconsin, and under authority of an act of the legislature of the territory of Wisconsin, constructed a dam across Fox river, the northern outlet of Lake Winnebago, which caused the waters of said lake to raise so high as to forcibly and with violence overflow 640 acres of Pumpelly's land, and the said waters thereafter so far possessed the same as that Pumpelly lost the proper use thereof.

The constitution of the state of Wisconsin contains the following fundamental statement:

"The property of no person shall be taken for public use without just compensation therefor."

The supreme court held that by the general law of European nations and the common law of England, it was a qualification of the right of eminent domain that compensation should be made for private property taken or sacrificed for public use.

And the constitutional provisions of the United States and of the several states which declare that "private property shall not be taken for public use without just compensation," were intended to establish this principle beyond legislative control.

It is not necessary that property should be absolutely *taken*, in the narrowest sense of that word, to bring the case within the protection of this constitutional provision. There may be such serious interruption to the common and necessary use of property as will be equivalent to a taking within the meaning of the constitution.

The backing of water so as to overflow the lands of an individual, or any other superinduced addition of water, earth, sand, or other material or artificial structure placed on land, if done under statutes authorizing it for the public benefit, is such a taking as by the constitutional provisions demands compensation.

The court in that case say:

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation

to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for inversion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

In the New Jersey case of *Sinnickson* v. *Johnson*, cited in the Pumpelly case, Judge Dayton, in his opinion therein, said:

"That this power to take private property reaches back of all constitutional provisions; and it seems to have been a settled principle of universal law that the right to compensation is an incident to the exercise of that power; that the one is inseparably connected with the other; that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle."

At the time of the rendition of this decision the state of New Jersey had no constitutional provision on the subject.

The state of New York had no constitutional provision on the subject in Chancellor Kent's time, when he, in the case of *Gardner* v. *Newburgh*, granted an injunction against diverting a stream through plaintiff's land from its usual course, because the act of the legislature authorizing it made no provision for compensating him for the injury done.

In the last named case it is laid down as a clear

principle of natural equity that the individual whose property is thus sacrificed must be indemnified.

Said case was where the diversion of the water from plaintiff's land was considered a taking of private property for public use, and therefore, like overflowing the land, be called only consequential damage or injury.

In Angell on Water Courses, section 465a, it is laid down as a rule that a serious interruption to the common and necessary use of property is a *taking* of it, and that it is not necessary that the land be absolutely taken.

Grotius was an early authority on the right of eminent domain. He said:

"We have elsewhere said that the property of subjects is under the eminent dominion of the state, so that the state, or he who acts for it, may use or even alienate or destroy such property, not only in cases of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. But it is to be observed that when this is done the state is bound to make good the loss to those who lose their property."

The power to take private property for public uses belongs to every independent government. It is an incident of sovereignty, and does not require constitutional recognition.

This power is recognized by the constitution of the United States wherein, by its fifth amendment, it declared that private property shall not be taken without just compensation.

The United States v. *Gettysburg Electric Ry. Co.*, 160 U. S. 668;

High Bridge Lumber Co. v. *The United States*, 37 U. S. App. 234;
Barron, etc., v. *Mayor of Baltimore*, 7 Peters 243.

In *Hallister* v. *Benedict Manufacturing Co.* (113 U. S. 59), a patent infringement case, it is stated:

"If the right of the patentee was acknowledged, and, without his consent, an officer of the government, acting under legislative authority, made use of the invention in the discharge of his official duties, it would seem to be a clear case of the exercise of the right of eminent domain, upon which the law would imply a promise of compensation, an action on which would lie within the jurisdiction of the court of claims, such as was entertained and sanctioned in the case of the United States against Great Falls Manufacturing Company (112 U. S. 645)."

It was held, in the case of *United States* v. *Palmer* (128 U. S. 262) that compensation must be made where the officers of the government use the patented device of an individual where he authorized its use by them.

See, also, *United States* v. *Berdan Firearms Co.* (156 U. S. 552).

And the court, in Lynah case, say:

"The rule deducible from these cases is that, when the government appropriates property which it does not claim to own, it does so under an implied contract that it will pay the value of the property it so appropriates. It is earnestly contended in argument that the government had a right to appropriate this property. This may be conceded, but there is a vast difference between a proprietary and a governmental right. When the government owns property, or claims to own it, it deals with it as *owner* and by virtue of its ownership, and if an officer of the gov-

ernment takes possession of property under the claim that it belongs to the government (when in fact it does not), that may well be considered a tortious act on his part, for there can be no implication of an intent on the part of the government to pay for that which it claims to own.

"Very different from this proprietary right of the government in respect to property which it owns is its governmental right to appropriate the property of individuals. * * * The contention that the government had a paramount right to appropriate this property may be conceded, but the constitution in the fifth amendment guarantees that when this governmental right of appropriation—this asserted paramount right—is exercised *it shall be attended by compensation.*

"The government may take real estate for a post-office, a court-house, a fortification or a highway; or in time of war it may take merchant vessels and make them part of its navel force. But can this be done without an obligation to pay for the value of that which is so taken and appropriated? Whenever in the exercise of its governmental rights it takes property, the ownership of which it concedes to be in the individual, it impliedly promises to pay therefor. Such is the import of the cases cited as well as many others."

See, also,

South Carolina v. *Georgia*, 93 U. S. 4, 13;
Wisconsin v. *Duluth*, 96 U. S. 379.

In the case at bar there is no dispute about the ownership of the lands taken being in appellants. The United States does not pretend to own the same. The government claims the right to appropriate these lands, without compensation, because it needed them in improving the navigation of the Mississippi river and the harbor of Vicksburg. Its contention is that when navigation is to be improved lands lying along

the navigable streams become mere riparian possessions burdened with the servitude of navigation, and subject to appropriation without compensation, and this is the position taken by the court of claims.

From the findings it is clear that what was a valuable plantation has been permanently swept away "as the necessary result of the work which the government has undertaken."

The case of *Pumpelly* v. *Green Bay Co.*, says this is a "taking" of appellants' lands for public use, as stated in the opinion of the court in the Lynah case.

See, also,

Angell on Water Courses, Section 465a;
Hooker v. *New Haven & N. Co.*, 14 Conn. 146;
Rowe v. *Granite Bridge Co.*, 21 Pick. 344;
Canal App. v. *The People*, 17 Wend. 604;
Lockland v. *North M. R. R. Co.*, 31 Mo. 180;
Stevens v. *Prop'r of Middlesex Co.*, 12 Mass. 466.

Commenting on these authorities the court, in the Lynah case, says:

"It is clear from these authorities that where the government, by the construction of a dam *or other public works*, so floods lands belonging to an individual as to substantially destroy their value there is a *taking* within the scope of the fifth amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested. Of course it results from this that the proceeding must be regarded as an actual appropriation of the land, including the possession, the right of possession and the fee; and when the amount awarded as compensation is paid the title, the fee, with whatever rights may attach thereto—in this case those *at least which belong to a riparian proprietor*—pass

to the government and it becomes henceforth the full owner."

How nicely the above language fits the case at bar. Here the revetment checked and permanently stopped the erosion of Delta Point, arrested the course of the Mississippi river and directed and held the current of the river against the Mississippi (state) bank so as to deflect it back to the Louisiana side against appellants' lands; and thus washed them away, and made the navigating channel of the river through the heart of appellants' said plantation, where said channel now is. 2,300 acres of appellants' lands have thus been taken and appropriated by the government to make a new channel for the Mississippi river so that the navigation of said river might be improved and the harbor of Vicksburg saved to the commerce of said river. It is a great big fact, and the individual contribution to this public enterprise is worthy of compensation.

The kernel of the case, however, is reached by the following language of the court in the Lynah case:

"Passing to the third question, it is contended that what was done by the government was done in improving the navigability of a navigable river, that it is given by the constitution full control over such improvements, and that if in doing any work therefor injury results to riparian proprietors or others it is an injury which is purely consequential, and for which the government is not liable. *But*, if any one proposition can be considered as settled by the decisions of this court it is that, *although in the discharge of its duties the government may appropriate property, it can not do so without being liable to the obligation cast by the fifth amendment of* PAYING JUST COMPENSATION."

The question was also squarely presented in the case of the *Monongahela Navigation Co.* v. *United States*,

148 U. S. 312, and the court delivered its decision as follows:

"Like the *other* powers granted to congress by the constitution, the power to regulate commerce is subject to all the limitations imposed by said instrument, and among them is the fifth amendment we have heretofore quoted. Congress has supreme control over the regulation of commerce, *but* if, in exercising that supreme control, it deems it necessary to take private property, *then* it must proceed subject to the limitation imposed by the fifth amendment, and can take only on payment of just compensation."

In the case of *Scranton* v. *Wheeler*, 179 U. S. 141, 153, the same proposition was stated as follows:

"Undoubtedly compensation must be made or secured to the owner when that which is done to be regarded as a taking of private property for public use within the meaning of the fifth amendment of the constitution, and, of course, in its exercise of the power to regulate commerce, congress may not override the provision that just compensation must be made when private property is taken for public use."

In the course of the court's opinion in the case of the *Transportation Company* v. *Chicago*, 99 U. S. 635, after referring to the cases above cited and others, the court said:

"Permanent flooding of private property may be regarded as a taking. In those cases there was physical invasion of real estate of the private owner, and a practical ouster of his possession."

Here appellants' lands have been physically invaded and he has been absolutely "ousted of his possession." The facts in the case at bar parallel those cases, and render just compensation for these lands imperative under the fifth amendment.

Even if we are to restrict the ownership of appellants' lands to mere riparian rights, it is unfair to appropriate them without compensation.

By the Encyclopedias England makes compensation where it takes such rights under its eminent domain.

The theory of our government is that the rights of the individual when subordinated to the public necessities shall be compensated for. Private property is subject to public uses only when paid for. It matters not for what special purpose private property may be taken, it is subject to the limitations of payment cast by the fifth amendment.

It can make no difference whether the property is taken in the regulation of commerce, the improvement of navigation, or to furnish wholesome drinking water for Washington, it is a "taking" for public uses, and must be paid for.

It is a great hardship which requires the appellants to contribute 2,300 acres of land that the city of Vicksburg shall remain on the Mississippi river. There are no benefits resulting to the claimants from the Vicksburg harbor. Why should they be compelled to sacrifice their possessions to such a purpose without compensation?

It is respectfully believed and submitted that the Lynah case is conclusive of the one at bar, and that the court of claims should be reversed and the cause remanded to that court with directions to give appellants judgment for the value of their lands taken and appropriated by the government as aforesaid.

JOHN C. CHANEY,
Attorney for Appellants.

March 3, 1903.